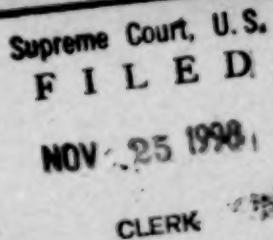


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No. 97-8629

In The
Supreme Court of the United States
October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fifth Amendment and the Right to Trial by Jury guaranteed by the Sixth Amendment require that the jury be instructed that it must unanimously agree as to the commission by the defendant of each of three predicate narcotics violations in order to find that the defendant engaged in a continuing criminal enterprise as prohibited by 21 U.S.C. § 848.

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BASIS FOR JURISDICTION

The case below involved a criminal prosecution of 11 defendants, including Petitioner Eddie Richardson ("Richardson"). Richardson was charged in Counts One and Two of the Indictment with violations of 21 U.S.C. §§ 846 and 848. The jurisdiction of the District Court was pursuant to 18 U.S.C. § 3231.

On May 23, 1995, the trial jury found Richardson guilty on Counts One and Two of the indictment.

On August 24, 1995, Richardson was sentenced to life imprisonment on each of Counts One and Two, to be served concurrently, plus five years of supervised release to be served thereafter. Richardson remains in federal custody serving the imposed sentence.

Richardson filed a timely notice of appeal on August 25, 1995. The U.S. Court of Appeals for the Seventh Circuit had jurisdiction over Richardson's direct appeal pursuant to 28 U.S.C. § 1291.

The Seventh Circuit's order affirming the Petitioner's conviction and sentence was entered on November 14, 1997. The Seventh Circuit denied a petition for rehearing with suggestion for rehearing *en banc*, filed by one of Petitioner's co-defendants, on January 7, 1998.

Petitioner timely filed a Petition for Writ of *Certiorari* on April 7, 1998. This Court has exercised its jurisdiction to review the Seventh Circuit's affirmation of Petitioner's conviction by issuing a writ of *certiorari* pursuant to 28 U.S.C. § 1254 on October 5, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

No person shall be . . . deprived of life, liberty, or property, without due process of law

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed

B. STATUTORY PROVISION INVOLVED

Title 21, United States Code, § 848

(a) Penalties; forfeitures.

Any person who engages in a continuing criminal enterprise shall [be guilty of an offense]

(c) "Continuing criminal enterprise" defined.

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

C. RULE INVOLVED

Rule 31, Federal Rules of Criminal Procedure

Rule 31. Verdict

(a) Return. The verdict shall be unanimous . . .

STATEMENT OF THE CASE

This petition arises out of the conviction and sentencing of Petitioner Eddie Richardson for conspiracy to possess with intent to distribute and to distribute quantities of cocaine, cocaine base and heroin, as well as for engaging in a continuing criminal enterprise ("CCE") involving that same conspiracy. After a seven-week trial, Richardson was found guilty by a jury of both the conspiracy

and the CCE. On August 24, 1995, Judge Holderman sentenced Richardson to life imprisonment and a fine of \$25,000 on each of Counts One and Two of the Indictment to be served concurrently. (Record 713, J.A. 39).

With respect to the CCE (Count Two of the Indictment), codefendant Carmen Tate submitted, and Richardson adopted two alternative instructions which would have required the jury to agree unanimously that Richardson had committed three predicate federal narcotics offenses, as well as to agree unanimously as to which three actions constituted those federal narcotics offenses. (J.A. 21-23). The court refused those instructions, and instead gave the government's proposed instruction and instructed the jury that they did not "have to agree as to the particular three or more federal narcotics offenses committed by the defendant." (J.A. 37, Tr. 5785).

The court's refusal of Tate's proposed instructions and charge to the jury that they did not have to agree as to the particular federal narcotics offenses upon which the CCE count was predicated denied Richardson his right to due process guaranteed by the Fifth Amendment to the Constitution and his right to a unanimous jury verdict guaranteed by the Sixth Amendment as well as Rule 31(a) of the Federal Rules of Criminal Procedure.

SUMMARY OF THE ARGUMENT

The trial court's refusal of Petitioner's requested instruction that the jury must find unanimously that Petitioner committed each of three predicate narcotics felonies in order to convict under the continuing criminal

enterprise statute violated Petitioner's right to jury specificity as to a necessary element of the offense. Jury specificity is required under the Fifth and Sixth Amendments as to each element of the offense charged. The predicate narcotics felonies constituting the continuing series are necessary elements of a continuing criminal enterprise offense requiring the jury's agreement as to their commission.

The legislative intent to require the predicate felonies to be proved particularly can be ascertained both by an examination of the language of the statute and by reading the legislative history. The statute on its face requires proof of at least one narcotics felony in particular, and also a continuing series of such felonies related to that one. A common sense reading of the statute suggests that a series of three related felonies must be agreed to unanimously to obtain a conviction. The legislative history reinforces this interpretation because the concerns expressed in connection with the passage of the CCE statute indicate a great sensitivity to the Due Process requirement that every element of the continuing criminal enterprise be proved.

Due Process requires that the statute be read to require juror unanimity as to each of the predicate felonies. Due Process requires fundamentally that an individual be charged with enough specificity to understand the nature of the charges. As a corollary, the jury must not be confused as to what the charges are, and the jury's verdict must reflect unanimous agreement as to the set of facts constituting the offense charged. In the context of a CCE prosecution, this means the jury must unanimously agree to the commission of each of at least three narcotics

offenses in order to find a continuing series of such offenses.

The trial court's failure to properly instruct the jury in this case was not harmless error. The instruction that the jury need not find unanimously as to the three predicate felonies rendered its verdict meaningless. The reviewing court can only guess as to what the verdict might have been had the jury been properly instructed.

Accordingly the Petitioner's CCE conviction should be reversed and remanded.

ARGUMENT

A. STATEMENT OF FACTS.

Richardson was charged, along with nineteen other individuals, in a three-count indictment alleging an extensive narcotics conspiracy spanning a period of approximately seven years in violation of 21 U.S.C. § 846. No overt acts were alleged. Essentially Richardson and a codefendant Carmen Tate were accused of controlling and directing a street gang by the name of the "Cicero Undertaker Vice Lords" which was accused in general terms of engaging in the business of selling heroin, cocaine and crack cocaine. (Record 1, J.A. 5-10). Richardson and Tate were also charged in a second count with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848. (Record 1, J.A. 11-12).¹ The "predicate

¹ The indictment also charged Carmen Tate and Juanita Thomas in a separate count with conspiracy to defraud the

narcotics offenses"² were alleged generally as the repeated distribution and possession with intent to distribute cocaine, cocaine base and heroin over the seven year period between 1984 and 1991.³ No specific incidents of such

United States in violation of 18 U.S.C. § 371. Additionally the indictment contained certain "Forfeiture Allegations" (Record 1, J.A. 18), which were dismissed by the government as to Richardson after the return of the verdict. (Record 601).

² Section 848(c) defines the offense in pertinent part as follows:

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

³ Count Two of the indictment alleges in part:

The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:

a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be

sales or possessions were alleged, nor were any substantive counts of sales or possession included in the indictment.

Trial was held over a period of seven weeks, and Richardson was found guilty of both the narcotics conspiracy and engaging in a continuing criminal enterprise. (Record 602). At trial, the government relied on three cooperating codefendants, Andre Cal, Michael Sargent and Johnnie Chew, to provide the only testimony directly implicating Richardson in narcotics sales. Their testimony was of a general nature, broadly describing a course of criminal conduct spanning seven years.⁴

distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in violation of Title 21, United States Code Section 841(a)(1).

b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code Section 841(a)(1).

(Record 1, J.A. 11-12).

⁴ The following colloquy between the prosecutor and Johnnie Chew is an example of the nature of this testimony:

Q. While you were an Undertaker, did you ever sell narcotics?

A. Yes, sir.

Q. When did you begin to sell narcotics?

A. In 1985.

Q. What types of narcotics did you sell?

A. Codeine syrup.

The government called numerous police officers to testify about drug arrests of Richardson's codefendants. None of these officers had ever arrested Richardson and some had never even seen him in their years of patrolling the area allegedly controlled by the Undertakers. Officer Robert Rodriguez had never arrested or stopped Richardson. [Tr. 2072]. Sergeant Richard Elmer, who had worked in the geographic area for 16 years up to 1990, and conducted "aggressive patrols" looking for drug dealing, had never arrested Richardson. [Tr. 2283]. Officer Timothy Cerven never arrested Richardson. [Tr. 2302]. Likewise Officer Frank Esposito [Tr. 2322], Officer Wayne Frano [Tr. 2354], Officer Gregory Kooyumjam [Tr. 2365], Officer Edward Mizera [Tr. 2377], Officer Luis Munoz [Tr. 2414], Officer Robert Rutherford [Tr. 2426], Officer Carlos Velez [Tr. 3918], and Officer Israel Pacheco [Tr. 2439].

Q. From what location did you sell codeine syrup?

A. Washington and LeClaire.

Q. Do you know who ran the spot located at Washington and LeClaire?

A. Christopher Raspberry.

...

Q. How often did you sell codeine syrup at that spot?

A. I sold there every day during the time we was working, every day.

...

Q. Approximately when did you stop selling at this location?

A. Early, I think, January of '86.

(Tr. 206-209).

The government also called agents of the federal Drug Enforcement Administration and Bureau of Alcohol, Tobacco and Firearms who had spent approximately three years investigating the Undertakers with a view to proving that Richardson was the ringleader. [Tr. 3789]. Agent William Zopp testified that in his three years on the case, he could not locate Richardson. [Tr. 3789].

With respect to the CCE charge, codefendant Tate submitted, and Richardson adopted two alternative instructions which would have required the jury to agree unanimously that Richardson had committed three predicate federal narcotics offenses, as well as to agree unanimously as to which three actions constituted those federal narcotics offenses. (J.A. 21-23). The court refused those instructions, and instead gave the government's proposed instruction and instructed the jury that they did not "have to agree as to the particular three or more federal narcotics offenses committed by the defendant." (J.A. 37, Tr. 5785). In reliance on that ruling by the court, the prosecutor argued that the jury could rely on any three of thousands of independent drug transactions.⁵

⁵ The prosecutor stated:

Now, with respect to those four elements, the evidence overwhelmingly shows it. A continuing series of three. What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual \$20 bag of heroin was sold, every time an individual \$10 dollar bag of rock cocaine was sold, that is a separate drug crime. And you literally had a series of thousands, and you can rely upon any of those three in reaching your verdict. (Tr. 5379, J.A. 31).

B. LEGAL ARGUMENTS

1. There Is a Split in the Circuits Regarding Jury Specificity as to the Predicate Narcotics Offenses Necessary to a CCE Conviction.

The court's instruction that the jury did not have to agree as to the predicate offenses making up the continuing series of violations, coupled with the prosecutor's invitation to rely on any three of thousands of offenses alleged to have occurred over the years, resulted in a probability that the jury returned a "patchwork verdict" in this case.⁶ This case accordingly presents squarely the issue as to whether the Due Process Clause and the Sixth Amendment require juror unanimity as to each of three or more violations alleged to constitute a "continuing series" of violations under the CCE statute.

In 1970, this Court held that due process requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [a defendant] is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Since then, this Court, as well as the lower courts, have wrestled with defining what is a "fact necessary to constitute the crime." Historically it has been long recognized that the means by which a particular crime is committed

⁶ A "patchwork verdict" results from piecing together the jurors' different conceptions of the predicate acts that satisfy the continuing series element of the offense. Eric S. Miller, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L.J. 2277, 2282 (1995).

are immaterial.⁷ This precept has been codified at Rule 7(c)(1), Federal Rules of Criminal Procedure, which allows charging in an indictment that the means of commission of the crime are unknown or that it was committed by one or more specified means. The question then becomes whether a fact is a mere means of commission of an offense or whether it is elemental to the offense.

In the context of the CCE statute, 21 U.S.C. § 848, definition of the necessary factual elements has resulted in disagreement among the federal circuits as to the nature of the offenses constituting the predicate "continuing series of violations" necessary to a violation of the statute. In *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), the Third Circuit has held that each member of the series is a factual element of the offense as to which the jury must agree. In *United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), the Seventh Circuit has held to the contrary, finding that the frequency of offenses, sufficient to constitute a "series," is the element to be found by the jury, leaving the determination of which offenses made up that number to the individual jurors. This Court has not addressed the issue of jury specificity in the context of a CCE prosecution previously, but its decision in *Schad v. Arizona*, 501 U.S. 624 (1991), offers some guidance in analyzing the issue in a somewhat similar context.

In *Schad*, *supra*, the issue presented was whether a first-degree murder conviction under jury instructions

⁷ *Andersen v. United States*, 170 U.S. 481 (1898) (The government was not required to prove that a death had occurred by shooting or drowning in order to sustain a murder conviction where the defendant was responsible for either).

that did not require agreement on whether the defendant was guilty of premeditated murder or felony murder is unconstitutional.⁸ While the Court characterized the issue as a due process right rather than one under the Sixth Amendment's guarantee of a unanimous verdict⁹, the Court also concluded that the distinction is "immaterial to the problem of how to go about deciding what level of verdict specificity is constitutionally necessary."¹⁰ As the plurality put it, the issue was "what the jury must be unanimous about" or, more formally, "the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions."¹¹

2. The Legislative Intent as Reflected in the Statutory Language and Legislative History Was to Require Juror Unanimity as to the Predicate Offenses.

The Court recognized in *Schad*, *supra*, that "[d]ecisions about what facts are material . . . and therefore must

⁸ A second issue, whether defendant was entitled to a lesser included offense instruction, is irrelevant to the case now before the Court.

⁹ Although the Sixth Amendment does not explicitly require unanimous verdicts, this Court has long recognized that the Sixth Amendment implicitly guarantees the right thereto in federal criminal cases. *Johnson v. Louisiana*, 406 U.S. 356, 370 (1972) (Powell, J., concurring). This right has been explicitly codified in Rule 31(a), Fed.R.Crim.P.

¹⁰ *Schad v. Arizona*, 501 U.S. at 634 n.5. In *Schad*, the jury was instructed that its verdict must be unanimous, eliminating the need to decide whether the Sixth Amendment guarantee of a unanimous verdict should be applied to the states through the Fourteenth Amendment's provisions.

¹¹ *Schad*, *supra*, at 631.

be proved individually, and what facts are mere means, represent value choices more appropriately made in the first instance by a legislature than by a court."¹² Therefore the legislative intent is the first question to be addressed.¹³

The CCE statute was drafted as part of the Drug Abuse Prevention and Control Act of 1970.¹⁴ The CCE specifically targeted those persons within a narcotics operation holding a position of management and authority, the "top brass."¹⁵ The legislative history indicates that the CCE was not aimed at "the casual drug user," but rather the "professional criminal."¹⁶ The penalties for a violation of the CCE are accordingly harsh, including mandatory minimum sentences of at least twenty years¹⁷, and in some cases, life imprisonment¹⁸ or the death penalty.¹⁹

The statutory requirements for a conviction under the CCE are set forth at section 848(c) thereof. A predicate

¹² *Schad, supra*, at 638.

¹³ See *United States v. Edmonds*, 80 F.3d 810, 815 (3d Cir. 1996) (*en banc*). In *Edmonds*, the Third Circuit, sitting *en banc*, reiterated its holding in *United States v. Echeverri*, 854 F.2d 638 (1988), after reexamining the issue in light of *Schad, supra*.

¹⁴ Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971) (1988).

¹⁵ *Garrett v. United States*, 471 U.S. 773, 781 (1985).

¹⁶ 116 Cong. Rec. 33, 631(1970).

¹⁷ 21 U.S.C. § 848(a) (1988).

¹⁸ *Id.* § 848(c).

¹⁹ *Id.* § 848(b).

offense, defined as a violation of any of the federal narcotics statutes the punishment for which is a felony,²⁰ must have been committed as part of a "continuing series" of such violations.²¹ Additionally the "continuing series" must have been committed in concert with five or more other individuals as to whom the defendant exercises a management role, and the defendant must have derived substantial income or resources therefrom.²²

The language of the statute itself provides an indication that the legislature intended that each violation comprising the "continuing series" be considered an element of the offense.²³ The definition of the offense states initially that

²⁰ The prohibited drug-related acts are found in §§ 841(a), 842(a) and 960(a).

²¹ 21 U.S.C. § 848(c)(2). The circuits are not unanimous in defining the number of violations necessary for establishing a "continuing series." The majority of the circuits addressing the issue have held a "continuing series" to be three or more violative acts. *United States v. Echeverri*, 854 F.2d 638, 642 (3d Cir. 1988); *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1570 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990). The Seventh Circuit, on the other hand, has held that only two predicate offenses are required. *United States v. Baker*, 905 F.2d 1100, 1102-05 (7th Cir. 1990), cert. denied, 498 U.S. 876 (1990). The issue did not arise in this case because the court instructed the jury that three offenses were required to establish a "continuing series." (Tr. 5785, J.A. 34).

²² 21 U.S.C. § 848(c)(2)(A) and (B). See Note 2 *supra*.

²³ This view is discussed at greater length in CyrusAmir Mokri, Comment, *Predicate Offenses and Jury Agreement Under the Continuing Criminal Enterprise Statute*, 1994 U.of C. Legal F. 325, 337-339.

a person is engaged in a continuing criminal enterprise if . . . he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony. . . .²⁴

The statute continues by providing that, in addition, the violation must be "part of a continuing series of violations. . . ."²⁵ Therefore on its face the statute requires that the jury find that the defendant committed a substantive drug violation, and that that violation was part of a continuing series of such violations.²⁶ At the very least, this would suggest that the jury must agree that a defendant committed at least one specific predicate offense.²⁷

²⁴ 21 U.S.C. § 848(c).

²⁵ *Id.*

²⁶ See *Garrett v. United States*, 471 U.S. 773, 786 (1985).

²⁷ It should be noted that the Third Circuit does not seem to agree with this analysis. In *United States v. Edmonds*, *supra*, the court in attempting to interpret the statute, stated:

The statute lends itself to either interpretation. On the one hand, the statute is triggered by violation of "any provision" as part of a "continuing series of violations." By placing no emphasis on the particular, the statute could be read to say that different routes of violation are fungible alternatives, suggesting that the provisions are mere "means."

80 F.3d at 817. This ignores the fact that the trigger is a discrete violation, not the provision violated, emphasizing the particular, contrary to the court's analysis. The court, however, also recognized that the predicate violations are recognized by Congress as separate offenses, ultimately finding the language of the statute inconclusive.

Logic suggests that the jurors must also agree on the other offenses that constitute the "continuing series."²⁸ It would be illogical to interpret one part of the statute to require specific agreement over one predicate act, but to interpret "continuing series" not to require specific agreement over the other predicate acts. Such an interpretation would suggest that a "continuing series" can be proved even if a jury agrees on only one predicate offense. Since there is no difference in definition between the one specific violation which must be proved and the other predicate violations comprising the "continuing series," it would not make sense to distinguish between them as to the level of jury certainty required.

Furthermore, the use of the term "continuing series" suggests that specific jury agreement should be required. The term is not defined in the statute, but the courts have uniformly interpreted it to require proof of a specific minimum number of related violations, in most cases three.²⁹ Common sense suggests that the jury must agree as to the three predicate acts comprising the "continuing series." If the jurors disagree over the predicate acts, the

²⁸ The requirement of a "continuing" series has led some courts to require that the predicate offenses be found to be related. See *United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986); *United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir. 1990).

²⁹ *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984). The Seventh Circuit is an exception and requires only two predicate offenses. *United States v. Baker*, 905 F.2d 1100, 1105 (1990). In the case before the Court, the trial judge nevertheless instructed the jury that it must find three predicate offenses. This Court, without addressing the issue directly, appears to have adopted the three-offense requirement in *Garrett v. United States*, *supra*, 471 U.S. 773, at 788, 804.

predicate acts themselves have not been individually proven. And because a "series" is made up of a number of individual acts, proof of a "series" should require proof of each of the constituent acts.

Furthermore the CCE statute, although similar in some respects to a conspiracy statute, requires more than just an agreement to commit an unlawful act.³⁰ It requires the actual commission of a predicate violation which is part of a continuing series of violations. The predicate violations, unlike mere overt acts in furtherance of a conspiracy, are themselves, by definition, viewed as separate and distinct offenses by Congress. This would suggest that they are not merely alternative means of committing a crime nor immaterial acts as to which the jury need not concur.³¹ If a defendant is charged with such a violation in a separate count, the jury must return a unanimous verdict in order to convict. To impose a lessser standard for conviction under the harsher CCE statute, where a continuing series is required, makes for an anomalous result.

The legislative history also supports the conclusion that Congress intended the predicate acts to be individually proven. This Court has had occasion to examine that history in *Garrett v. United States*, 471 U.S. 773, 782-784 (1984), concluding that the CCE statute was intended to be a separate and distinct offense from the underlying

³⁰ See *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981).

³¹ The Third Circuit found this suggestive that Congress intended the predicate offenses to be elemental. *United States v. Edmonds, supra*, at 817-818.

predicate violations, and not just a sentencing enhancement statute for recidivists.

H.R.18583 is the bill that was enacted to become the Comprehensive Drug Abuse Prevention and Control Act of 1970. As originally introduced in the House, H.R. 18583 had a section entitled "Continuing Criminal Enterprises" which in reality was a recidivist provision which provided for enhanced sentences for an individual who committed a drug felony as part of a pattern of criminal conduct. Representative Dingell proposed an amendment, which was ultimately passed as § 848, addressing concerns about the lack of due process in the fact finding under the proposed recidivist provision. The amendment made engaging in a CCE "a new and distinct offense with all of its elements triable in court."³²

The comments of Representative Eckhardt illustrate the concerns of certain members of the Congress regarding the statute's impact on due process rights. While criticizing the recidivist approach, he stated, "[b]ut we would be making a terrible mistake if, because of its emotional impact, we should throw away the due process of law."³³ He supported the Dingell amendment's approach, which assured that "if you are going to prove a man guilty, you have to come into court and prove every element of the continuing criminal offense."³⁴ This focus on proof of "every element" of the continuing criminal

³² H.R. Rep. No. 91-1444, pt. 1, pp. 83-84 (1970) (additional views).

³³ 116 Cong. Rec. 33,631 (1970) (remarks of Rep. Eckhardt).

³⁴ *Id.*

offense, in contrast to the less rigorous proof required under the provisions under discussion in the recidivist provision, suggests strongly that the Congress perceived and intended the Dingell amendment to require proof of each particular predicate felony constituting the continuing offense.

The Seventh Circuit, it should be noted, found the legislative history to support a construction of the statute requiring no jury agreement as to the predicate felonies. This finding was premised upon the view that requiring juror unanimity as to the predicate acts "will result in unjustified acquittals frustrating the important policy goals of the CCE." *United States v. Canino*, 949 F.2d 928, 948 (1991). This concern about "unjustified acquittals" is certainly not reflected however in the remarks of the proponents of the Dingell amendment which ultimately became the law. The Seventh Circuit, rather than acknowledging the intent of the Dingell amendment to require proof of every element of the continuing criminal offense," concluded that a conviction is justified "when the jury has a unanimously agreed sense *that* the defendant exhibited such conspiratorial frequency rather than a shared sense of *what* those acts may have been." *United States v. Canino*, *supra*, 949 F.2d 928, 948 n. 7. It is impossible to reconcile a requirement of proof of every element with a requirement that the jury only have an agreed "sense" as to those elements. This suggests the Seventh Circuit has misconstrued the legislative history and intent.

The statute on its face suggests that the predicate narcotics felonies were intended by Congress to be proven as elements of a CCE violation. The remarks of

the members of Congress in the debates prior to the passage of the statute make clear that rigorous proof of the elements of a CCE violation was intended because of the due process concerns. Accordingly, while admittedly not as clear as it might have been, the Congress has evidenced an intent that the statute should be interpreted to require jury agreement as to the specific predicate offenses.

3. Due Process Requires Juror Specificity as to the Predicate Narcotics Violations.

While legislative intent, to the extent discernable, is to be honored by the courts in construction of a statute, Due Process concerns place some limits on the legislature's power to define different courses of conduct as merely alternative means of committing a single offense.³⁵ Accordingly even if it were determined that the Congress, in enacting the CCE, intended the predicate narcotics offenses to be considered mere means of commission of the continuing criminal offense, this Court must determine that such a construction is constitutional in light of the Due Process Clause.

The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to differing guesses about its meaning, carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity

³⁵ *Schad v. Arizona*, 501 U.S. 624, 632 (1990).

the legal basis of the charge against him.³⁶ As this Court stated in *Schad v. Arizona*:

[N]o person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, [citation omitted], nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction. [footnote omitted].

Schad v. Arizona, 501 U.S. at 633.

The issue of verdict specificity had not been treated by the Supreme Court prior to *Schad, supra*, although it had arisen in the lower courts in the context of the Sixth Amendment guarantee of a unanimous verdict.³⁷ In *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977), the defendant was charged in a single count with violating 18 U.S.C. § 2313, which prohibited knowingly receiving, concealing, storing, bartering, selling or disposing of any stolen vehicle. The defendant was convicted after the trial court charged the jury that it need not agree on which of the enumerated acts the defendant had committed. The Fifth Circuit reversed finding a violation of the defendant's right to "jury concensus as to [his] course of

³⁶ *Id.*

³⁷ This Court has recognized that the issue is more accurately characterized as a Due Process concern. *Schad v. Arizona*, 501 U.S. at 634, note 5.

action." *United States v. Gipson*, 553 F.2d at 456. The court found that the statutory prohibitions could be grouped conceptually, so that receiving, concealing and storing could be grouped as "housing," and bartering, selling and disposing could be grouped as "marketing." The Fifth Circuit held that the jury must decide separately as to each grouping. *United States v. Gipson*, 553 F.2d at 456-459. This Court in *Schad, supra*, refused to adopt the conceptual groupings test, however, because ultimately "the notion is too indeterminate to provide concrete guidance to courts faced with verdict specificity questions." *Schad v. Arizona*, 501 U. S. at 635.

In both *United States v. Gipson, supra*, and *Schad v. Arizona, supra*, the verdict specificity issue was slightly different from that in this case. In each of those cases, the jury was left with a number of theories of criminal conduct from which to choose, rather than with a number of separate predicate acts from which to choose. This case is more similar to *United States v. Beres*, 833 F.2d 455 (3d Cir. 1987). In *Beres*, the defendant, a union official was charged with violations of 29 U.S.C. § 501(c) and 18 U.S.C. § 664.³⁸ In several of the counts charging those

³⁸ In pertinent part, section 501(c) provides that:

[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly [is guilty of an offense].

29 U.S.C. § 501(c) (1982). Similarly, section 664 provides that:
[a]ny person who embezzles, steals or unlawfully and willfully abstracts or converts to his own use or to the

violations, the government contended that the violations were accomplished by the defendant's engaging in several activities any one of which could have supported a conviction in more than one manner.³⁹ The trial judge instructed the jury that

the government contends the defendant violated [the particular statute] in more than one manner . . . Therefore, if you find beyond a reasonable doubt that one method, mode, or manner of violating the law occurred, that is sufficient to find the defendant guilty so long as you agree

use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefits plan, or of any fund connected therewith, shall be [guilty of an offense].

18 U.S.C. § 664 (1982).

³⁹ E.g., in Count 3 of the indictment, it was alleged that the defendant James M. Beros, did willfully and unlawfully embezzle, steal, abstract and convert to his own use the monies, funds, property and other assets of Joint Council 40, to wit, the approximate sum of \$1,063,000, expenses incurred by James M. Beros for a plane ticket in the name of Mrs. C. Beros, for a flight to Ft. Lauderdale, Florida, and lodging in Hollywood, Florida.

The government presented evidence as proof of that charge that in connection with the trip to Florida, ostensibly to attend a union conference, Beros (1) used a Joint Council credit card to pay airfare for himself and his wife; (2) occupied a hotel suite that cost \$160 per day, rather than a room which would have cost \$60 per day; and (3) remained in Florida for personal reasons after the conference but continued to expend union funds. *United States v. Beros*, 833 F.2d at 458.

unanimously upon the particular method, mode or manner that occurred.

United States v. Beros, 833 F.2d at 459.

The Third Circuit reversed the conviction because of the inherent potential for juror confusion where the jury was not instructed that it must find unanimously that the defendant committed a particular *predicate act* which violated the law. The court, citing the possibility of a patchwork verdict as to such a predicate act, condemned the possibility of conviction by a jury that was not unanimous as to the defendant's specific illegal action.

In this case, the permutations that can support a valid conviction are varied and several. What may not vary, however, is the required unanimity of each aspect of the jury's finding. We are convinced that the Sixth Amendment requires such unanimity, and we must be certain that the jury was properly instructed to achieve it. [citation omitted].

United States v. Beros, supra, at 462.

When the Third Circuit later decided *United States v. Echeverri*, 854 F.2d 638 (1988), where the defendant was charged with a CCE violation, it found that case to be indistinguishable from *United States v. Beros*. The trial court refused to instruct the jurors that they must reach unanimous agreement concerning which three predicate narcotics violations had occurred. The Third Circuit found, as in *Beros*, that "the district court failed to ensure that the 'jurors [would] be in substantial agreement as to just what [happened] as a step preliminary to determining whether the defendant is guilty of the crime charged.'

[citing *United States v. Gipson, supra*.]” *United States v. Echeverri*, 854 F.2d at 643.

The Third Circuit, *en banc*, later elaborated on this view in *United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996). The defendant was convicted of violating the CCE statute after the court refused to instruct the jury that they must unanimously agree on which three related violations had occurred. The Third Circuit examined the issue in light of *Schad v. Arizona*, 501 U.S. 624 (1991), turning first to the legislative history and then to “tradition in criminal jurisprudence.”⁴⁰

Criminal trials have long ensured substantial jury agreement as to the facts establishing the offense. This is because criminal statutes and common law have generally defined crimes in terms of conduct (and accompanying mental state) that takes place in a single place at some specific time. For example, murder statutes require that the defendant killed some other person, an act occurring in some specified time and place. . . . When there is a real risk that a jury will convict without agreement on a discrete set of actions, courts have required specific unanimity instructions. [citation omitted]. In our view, substantial agreement on a discrete set of actions is essential to ensure that the defendant

is guilty beyond a reasonable doubt of some specific illegal conduct.⁴¹

United States v. Edmonds, 3 F.3d at 817-818.

The court concluded that Congress had not intended that a CCE conviction could rest upon jury agreement merely that the defendant committed some three narcotics violations even where it was alleged the defendant had committed many different acts occurring at different times and places. The court cited Judge Scalia’s concurring opinion in *Schad* where he pointed out, in criticizing the plurality’s moral equivalence test of constitutionality, “[w]e would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the ‘moral equivalence of those two acts.’” *United States v. Edmonds, supra*, at 819.

The case before this Court is factually indistinguishable from *Edmonds*. Richardson was charged generally with a continuing series of violations of the narcotics laws. No specific incidents of such violations were charged in the indictment. The prosecutor presented evidence at trial of “thousands” of such violations, and invited the jury to find any three of those thousands as predicates for a continuing series. Finally the judge instructed the jury that it need not find unanimously as to which particular violations had been committed. The rationale in *Edmonds* is compelling and should be applied in this case. Richardson’s right to Due Process was violated by the trial court’s instructions.

⁴⁰ *United States v. Edmonds*, 3 F.3d 810 at 818. The Third Circuit first examined the tradition in criminal jurisprudence as an aid to interpreting the CCE statute, but also recognized that due process is defined in part by historical practice. *Id.* at 819. This was a factor recognized by this Court in *Schad v. Arizona*, 501 U.S. at 640.

⁴¹ The court cites to a discussion of this issue in Scott W. Howe, *Jury Fact-Finding in Criminal Cases*, 58 Mo.L.Rev. 1 (1993) for additional support.

4. The Trial Court's Failure to Properly Instruct the Jury was not Harmless Error.

The trial court's error in improperly instructing the jury in this case allowed the jury to return a non-unanimous verdict as to an element of the CCE offense. Because of this, the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967), does not apply.

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court unanimously held that a constitutionally deficient reasonable doubt instruction is not subject to harmless error analysis. The Court reasoned that a verdict of guilty beyond a reasonable doubt is a necessary predicate of the harmless error inquiry. The failure of the trial court to give a proper instruction thus rendered the jury verdict meaningless, providing no object on which the harmless error analysis could be applied. *Sullivan v. Louisiana*, 508 U.S. at 279-80.

In this case the jury was erroneously instructed that it need not find unanimously as to which three predicate narcotics offenses had been committed. Therefore there is no actual verdict of guilty upon which the harmless error analysis can operate. Furthermore, since there were no predicate acts charged substantively, there were no facts necessarily found by the jury so closely related to the fact tainted by the erroneous instruction as to result in a functionally equivalent finding.⁴² Accordingly the error in this case cannot be said to be harmless beyond a reasonable doubt and the judgment should be reversed.

CONCLUSION

For all of the foregoing reasons, Petitioner Eddie Richardson respectfully requests this Court for an order reversing and remanding for a new trial his conviction on Count Two of the Indictment.

Respectfully submitted,

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⁴² See *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judgment).